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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

KYLE FELLERS, ANTHONY FOOTE,)
NICOLE FOOTE, and ELDON RASH,)

Plaintiffs,)

v.)

Case No. 1:24-cv-311-SM-AJ
October 8, 2024

MARCY KELLEY, Superintendent)
of Schools, State)
Administrative Unit 67, in her)
official and individual)
capacities; MICHAEL DESILETS,)
Athletic Director, Bow High)
School, in his official and)
individual capacities; MATT)
FISK, Principal, Bow High)
School, in his official and)
individual capacities; PHILLIP)
LAMY, Lieutenant, Bow Police)
Department, in his individual)
capacity; STEVE ROSSETTI,)
soccer referee, New Hampshire)
Interscholastic Athletic)
Association, in his individual)
capacity; and BOW SCHOOL)
DISTRICT,)

Defendants.)

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE STEVEN J. MCAULIFFE
UNITED STATES DISTRICT JUDGE

APPEARANCES

FOR THE PLAINTIFFS:

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OCTOBER 8, 2024

AFTERNOON SESSION

THE CLERK: The Court is in session and has for consideration a motion hearing in the matter of Kyle Fellers, et al. vs. SAU 67 Superintendent, et al. Case No. 24-cv-311-SM.

THE COURT: How do you pronounce your name, Mr. Kolde?

MR. KOLDE: Endel Kolde or Kolde; Kolde is fine.

THE COURT: What do you prefer?

MR. KOLDE: Kolde is fine, Your Honor; it's easier.

THE COURT: But what do you prefer?

MR. KOLDE: Kolde a little bit.

THE COURT: Kolde?

MR. KOLDE: Yeah.

THE COURT: Okay. Mr. Kolde, it's your motion.

MR. KOLDE: Thank you, Your Honor. And before I begin, I just want to introduce my clients that are in the courtroom. We've got Nicole Foote, Andy Foote, Kyle Fellers, and Eldon Rash.

May it please the Court. A lot of ink has been spilled about *Tinker* and with good reasons.

1 THE COURT: Not enough. Do you think *Tinker*
2 applies? I don't think it does.

3 MR. KOLDE: Well, I think I agree with you.
4 I think in some ways it does, and in other ways it does
5 not. The similarities are somewhat obvious, at least
6 on the surface.

7 THE COURT: Well, it's not student speech,
8 right?

9 MR. KOLDE: I agree with that.

10 THE COURT: All right. So...

11 MR. KOLDE: I think that matters. Both do
12 involve passive silent protest by wearing a piece of
13 cloth on the wrist, color symbolizing viewpoint, black
14 in *Tinker*; pink for women's sports in our case.

15 The *Tinker* armbands also had a peace symbol on
16 them, and some of our wristbands had the symbol XX for
17 female chromosomes. Both involve a contentious social
18 and political issue that divides Americans, and in both
19 cases there was fear of possible disruption but no
20 evidence of actual disruption. Both cases involve an
21 overreaction by school officials.

22 But as I think this Court's question pointed out,
23 this case is -- our case is fundamentally stronger than
24 the plaintiffs in *Tinker* in ways the defendants have
25 largely ignored. Our plaintiffs are adults, not

1 students. And unlike the students in *Tinker*, they are
2 not speaking in the classroom or a hallway during
3 school hours. They are speaking in a limited public
4 forum after school.

5 And, you know, we didn't really get the benefit of
6 their briefing until yesterday, but they don't engage
7 with this issue, and we didn't have time to reply, but
8 if the Court wants a case on the notion that adults
9 have more rights than students, there's the *Mcelhaney*
10 case --

11 THE COURT: I would say different.

12 MR. KOLDE: Different?

13 THE COURT: Different rights.

14 MR. KOLDE: Yes.

15 THE COURT: Yeah.

16 MR. KOLDE: 81 F. 4th 550 at 558.

17 THE COURT: No, I'm familiar with *Mcelhaney*.

18 MR. KOLDE: Okay. Very good, Your Honor.

19 So First Amendment cases rise and fall, ordinarily
20 on forum analysis. As the Court knows, we start with,
21 What is the forum? This is an after-school sporting
22 event, a limited public forum. Clear case law cited in
23 our brief supports that. They don't really talk about
24 forum analysis, but even the *Foote* case, no relation to
25 our *Foote*s, says that sporting events, school sporting

1 events are a limited public forum. That's important.

2 Limited public forums are not subject to the same
3 kind of balancing test that in-school student speech
4 is. In a limited public forum, the government can have
5 reasonable content-based restrictions if they are
6 related to the purposes of the forum and viewpoint
7 neutral. They must be viewpoint neutral. Defendants
8 have essentially done no forum analysis. They've
9 treated my clients like students, but they're adults.

10 Importantly, Defendants all but admit they were
11 engaging in viewpoint discrimination. The whole point
12 of their free speech crackdown was to prevent my
13 clients from expressing their views about reserving
14 women's sports for biological women. Everyone in this
15 courtroom knows that if my clients had worn rainbow
16 wristbands to celebrate trans inclusion or blue and
17 white wristbands to support Ukrainian resistance to
18 Russian aggression, nothing would have happened.

19 They have no argument that what they did was
20 viewpoint neutral. And in a limited public forum, what
21 they did is per se illegal. There is no viewpoint
22 discrimination allowed. In a classroom, schools are
23 allowed to engage in some viewpoint discrimination.
24 For example, you cannot promote drugs or substance
25 abuse.

1 Here, my clients wanted to quietly express their
2 views about women's sports at a women's sporting event.
3 Their speech was not off topic. It was just her own
4 point of view that the defendants wanted to prevent
5 from being expressed, and they are open about it. They
6 describe my clients like criminals, furtively
7 distributing wristbands like drugs or contraband, or
8 pamphlets denouncing the monarchy or taxation without
9 representation. And they treated the pink wristbands
10 as beyond the pale because of their viewpoint.

11 What is also interesting is that defendants appear
12 to concede that there was no actual disruption until
13 school officials began confronting my clients and
14 forcing them to remove their wristbands.
15 Understandably, my clients didn't like being told that
16 they couldn't wear the wristbands, and they voiced
17 their opposition to it.

18 Americans don't have to be nice to government
19 officials, especially when their rights are being
20 violated. It is the birthright of all Americans to
21 talk back to the government. That's why we have the
22 First Amendment. Our country was founded on people who
23 were literally committing treason to found the United
24 States.

25 Now, there are numerous cases that stand for the

1 proposition that Americans can speak disrespectfully to
2 government officials. I've litigated some of them:
3 *Mama Bears of Forsyth County* --

4 THE COURT: Do you think -- is it your
5 contention that the protest, such as it was, was aimed
6 at who? Because, as I understand the context, which
7 is *Everly* --

8 MR. KOLDE: Yeah.

9 THE COURT: -- there's nothing the school
10 district could do about transgender girls playing on
11 girls' teams. There was a Federal Court injunction,
12 and the particular plaintiff in that case was an actual
13 player at that event.

14 What was the -- you said criticizing officials,
15 but who was it aimed at, the Court?

16 MR. KOLDE: Okay. I think there's a fair
17 clarification. So the wristbands are -- themselves,
18 are an expression of support for women's sports. They
19 are also an expression of opposition to including
20 biological men in women's sports. They were not
21 directed at any particular player on the other team,
22 and there's no evidence that it was directed at Parker
23 Tirrell, for example. There's been no evidence
24 submitted by Defendants in this case.

25 THE COURT: What's your position? It would

1 be, Yes, there's a lot more -- there's a lot more
2 leeway to criticize government officials --

3 MR. KOLDE: I'm sorry, Your Honor, I'm having
4 a tough time hearing the Court with the background
5 noise.

6 THE COURT: Oh, it's all right. It's a kid;
7 it's not a problem.

8 There's a lot more leeway, as I read the case law,
9 for an adult to criticize government officials than,
10 certainly, to criticize a student engaged in a school
11 activity. We agree with that. You can't harass a kid
12 during a school --

13 MR. KOLDE: We agree, you can't harass a kid
14 during school.

15 THE COURT: You can, however, you have great
16 leeway of criticizing government officials.

17 MR. KOLDE: Yes, and I think --

18 THE COURT: Now -- I'm not finished.

19 MR. KOLDE: Oh, yeah. Fair enough.

20 THE COURT: So we agree there.

21 MR. KOLDE: Yeah.

22 THE COURT: So then the question is: What is
23 your view of what the protests consist of? Protests in
24 space? In other words, I'm just broadcasting to the
25 universe that this is our view, or is it aimed at

1 somebody?

2 MR. KOLDE: So a couple things, Your Honor.
3 There's no evidence it was aimed at anybody in
4 particular.

5 THE COURT: That is your position.

6 MR. KOLDE: That is our position.

7 THE COURT: Not aimed in the anyone in
8 particular.

9 MR. KOLDE: Not aimed at anyone in
10 particular. It was merely an expression of how they
11 felt about it.

12 THE COURT: Okay. Fair enough.

13 MR. KOLDE: It was aimed at the community in
14 general. It was aimed at the community in general,
15 including other parents who were present. It could be
16 aimed at school officials who were present.

17 THE COURT: Semi-persuasive advocacy.

18 MR. KOLDE: I would say it's a passive
19 expression of support for women's sports and for
20 opposition --

21 THE COURT: The point being, garner support
22 for my view. I want garnered support among those who
23 have input for our view.

24 MR. KOLDE: Yes. And we disagree with --

25 THE COURT: Advocatory in a way.

1 MR. KOLDE: We disagree with the Court's
2 ruling in the *Tirrell* case, which will certainly be
3 appealed, and may not be the last word on the New
4 Hampshire state law.

5 THE COURT: Courts don't care.

6 MR. KOLDE: Yeah, right.

7 THE COURT: But what I'm trying -- so that's
8 your position. So here's the real question: In
9 context, doesn't the factual record have to be
10 developed before I, or a jury, could determine whether
11 that's the case?

12 MR. KOLDE: I don't think they --

13 THE COURT: It wasn't directed at the other
14 player. I'm going to guess and say the school district
15 takes a different view of that.

16 MR. KOLDE: They have not said anything to
17 that effect, Your Honor, and if you look at their
18 declarations, there's no evidence anything was directed
19 to the other player.

20 THE COURT: Okay. Well, we'll see.
21 Supposing they do, doesn't that factual issue have to
22 be developed and resolved?

23 MR. KOLDE: We would argue that --

24 THE COURT: Because you've agreed you can't
25 direct that kind of protest at a kid.

1 MR. KOLDE: It depends on what it is, Your
2 Honor. It depends on what the conduct is. If it's
3 harassing -- and I'm using the definition of harassment
4 that is in the *Doe vs. Portland Public Schools*, 701 F.
5 Supp 3d 18 at 36.

6 THE COURT: You're familiar with the *L.M.*
7 case, I assume?

8 MR. KOLDE: Of course.

9 THE COURT: Judge Barron there talks about
10 demeaning speech towards an immutable characteristic of
11 someone's personal identity, that sort of thing.
12 Wouldn't this fall into that category, if it were
13 directed at the student?

14 MR. KOLDE: Well, first of all, you could
15 argue about whether it's an immutable characteristic or
16 not, and, you know, we can get into gender ideology and
17 feelings about gender and feelings about biological
18 sex, you know, which is -- and queer theory which
19 underlies a lot of trans ideology. We don't need to
20 get into that.

21 THE COURT: That makes -- requires even more
22 factual development.

23 MR. KOLDE: So *L.M.* is in a school setting,
24 and we all agree, and I think the Court would agree,
25 that the school officials have a lot more leeway to

1 regulate student speech in a school setting. This is
2 adult speech in a limited public forum, and there's no
3 evidence in any of their declarations that any speech
4 was directed at Parker Tirrell.

5 If we look at the facts, Parker Tirrell didn't
6 even know what was going on. The -- when Rossetti, the
7 referee, stopped play -- if you look at their
8 declarations, they're talking about, you know, What's
9 going on? Why is play being stopped? Well, they won't
10 take the wristbands off. This had nothing to do with
11 Parker Tirrell expressing any concerns or feeling that
12 comments were directed at Parker. Parker didn't even
13 know what was going on. And nothing in their
14 declarations indicates that Parker did know.

15 They do talk about a concern that other types of
16 potentially harassing behavior was going to occur at
17 that game that did not occur. They talk about rumors.
18 They talk about hearsay. They don't say who said them
19 or where they got the information about people wearing
20 dresses. Didn't happen. About people shouting things.

21 THE COURT: Before we stray too far, I think
22 I agree with you that this -- *Tinker* is not the
23 analytical approach to take in this case. It's limited
24 public forum --

25 MR. KOLDE: Correct.

1 THE COURT: -- analysis.

2 But doesn't *Tinker* inform us as to the nature and
3 scope of the school district's duty with respect to
4 students engaged in school activities?

5 MR. KOLDE: If they're in the classroom, yes.

6 THE COURT: Well, no. They're under school
7 supervision in all kinds of extracurricular activities
8 on school property; for example, athletics. They're
9 still -- they're still under school supervision and
10 direction, aren't they? The only difference being that
11 now is you have adult invitees into the limited public
12 forum, but their duty to the students doesn't change;
13 it doesn't become less because they're playing soccer
14 than they are in drama club or something, or does it?
15 You think it does?

16 MR. KOLDE: Well, I think it depends on what
17 you're saying, Your Honor. I'm coming at it from the
18 plaintiffs' --

19 THE COURT: Well, *Tinker* says, Look, schools
20 are different because educators have a responsibility
21 to mold and direct and educate children and protect
22 them. That's why they can limit speech, to a greater
23 extent. An adult is different. An adult in a limited
24 public forum is different, different rights, but the
25 duty to the students translates to the limited public

1 forum.

2 MR. KOLDE: Well, I don't think you can use
3 the duty to the students as --

4 THE COURT: Duty to protect.

5 MR. KOLDE: But protect from what? Harmful
6 ideas?

7 THE COURT: Harassment, intimidation,
8 threats, disruption.

9 MR. KOLDE: There are no facts supporting
10 that.

11 THE COURT: I know that. We're talking about
12 law here; we're not talking this case.

13 MR. KOLDE: I mean, in theory, if somebody
14 is --

15 THE COURT: I'm trying to find out what -- do
16 we have a ground for agreement that *Tinker* sets the
17 standard for a school's obligation towards students.
18 It doesn't -- I agree with you, I think; it doesn't
19 dictate the analysis for determining the extent of
20 adult rights attending an event.

21 MR. KOLDE: I don't think *Tinker* sets the
22 standard. I think *Tinker* provides some persuasive
23 authority in this case because, in *Tinker*, you had a
24 similar concern about potential disruption that never
25 occurred. I would point the Court to Footnote 3 in

1 *Tinker* where there was a discussion about concern, for
2 example, that other students would respond by wearing
3 different color wristbands or armbands, as if that were
4 a big deal.

5 THE COURT: Your argument is, they couldn't
6 restrict the symbols in *Tinker*; they sure as heck can't
7 restrict the symbols in the limited public forum.

8 MR. KOLDE: You got it, Your Honor.

9 THE COURT: But in my mind, it raises a
10 question that says, Well, to what degree can the school
11 limit the public -- the semi- -- the limited public
12 forum? What restrictions on speech can they impose?
13 And that might turn on, What's their aim? What's their
14 goal? What authority, what duty are they vindicating
15 in imposing an instruction? And you seem to be saying,
16 No, no, that doesn't have anything to do with it.

17 MR. KOLDE: Well, I didn't say that.
18 Two-part answer, Your Honor. Number one, inherent in
19 the proposition that my clients were engaging in a
20 passive, quiet protest by wearing wristbands is that
21 they were not directing harassing comments at any
22 particular player. So I think -- I think that's very
23 important.

24 Might there be a different situation if my clients
25 had directed comments at Parker Tirrell or any

1 particular player? Yeah, this would be a different
2 case. But there is no evidence of that in this case.
3 And I think it's very important, all the things they
4 have said, they have not pointed to one act of a
5 particular comment being directed, derogatory comment,
6 being directed at Parker Tirrell specifically. It's
7 not in their declarations. They talk about things they
8 were worried about that might happen but did not
9 happen, and that's not good enough to censor speech.

10 I think another thing where the Court may have
11 misunderstood me earlier is that we didn't learn until
12 we got their declarations and responsive filings is
13 part of what seems to be motivating them here is that
14 they are upset that our clients talked back to them
15 when they asked them to remove the wristbands. And
16 they seem to be particularly upset that Kyle Fellers
17 said that they were acting like Nazis.

18 And this is what I was talking about specifically,
19 about talking back to officials, Your Honor. Okay?
20 They got mad because my clients didn't comply right
21 away. And, particularly, Kyle Fellers talked to them
22 and called them Nazis, which he is entirely entitled to
23 do.

24 And this is my point in citing *Marshall vs. Amuso*,
25 my case, 571 F. Supp. 3d 412 at 422. That's a

1 Pennsylvania case, also school boards; *Mama Bears of*
2 *Forsythe County*, also my case, school boards case, 642
3 F. Supp. 3rd 1338, 1350. That one is the Northern
4 District of Georgia. Not my case but a very important
5 case, *Ison*, 6th Circuit, 3 F. 4th 887 at 895. All
6 cases where school board officials got upset because
7 parents were criticizing them in ways they didn't like,
8 and they overreacted by censoring speech. That does
9 seem to be playing a role here. That was my point.

10 The wristbands are, in part, directed at the
11 school officials but not specifically. They don't have
12 their names on them. My clients weren't waving them in
13 their faces. They are directed at the community at
14 large. Many people that were at that event had no idea
15 my clients were wearing the wristbands or what they
16 stood for. There only was any attention drawn to them,
17 almost like the Streisand effect, when Defendant
18 officials came over and singled them out and made them
19 remove the wristbands. If they would have just left my
20 clients alone, there wouldn't have been any problem.
21 Likely Parker Tirrell wouldn't have even know that
22 people were wearing these wristbands because, guess
23 what, people wear pink wristbands all the time for
24 different reasons -- breast cancer awareness or just
25 because they want to wear a wristband.

1 THE COURT: The record suggests one of your
2 clients held up a sign, I can't remember what it said,
3 but a sign about this issue aimed at the opposing
4 school bus when it was leaving. Does that change
5 anything? That's not a passive wristband.

6 MR. KOLDE: I would say our focus is on the
7 wristband, Your Honor.

8 THE COURT: I know. My focus at the moment
9 is on the sign. Does that change anything?

10 MR. KOLDE: So -- I don't think so because
11 the sign didn't say anything --

12 THE COURT: Clearly, it was directed at
13 students.

14 MR. KOLDE: It was out in the parking lot.
15 There's no evidence the students saw it. There was
16 a --

17 THE COURT: I thought he was holding it up at
18 the bus as it left.

19 MR. KOLDE: That's what they thought would
20 happen, but the bus wasn't going by; and, you know, my
21 client, if he were to testify, would say, I moved my
22 car so I could watch my daughter's soccer game. I
23 couldn't see it where my car was parked before. By the
24 way, I had the sign in my windshield during the entire
25 first half. It was a positive message about women's

1 sports. It said nothing about Parker. It said nothing
2 specifically about trans people or trans athletes.

3 THE COURT: What did it say?

4 MR. KOLDE: I would have to look at the
5 declaration to get the exact language of it. Give me a
6 moment, Your Honor.

7 "Protect women's sports for female athletes."
8 It's a handwritten poster. That's it. And he would
9 testify the reason he held it up was because he had
10 been excluded from the game and forced to remove the
11 wristband which, obviously, he didn't like and was
12 upset about to the point that he called the school
13 officials Nazis, which they didn't like and almost led
14 to them arresting him. And by the way, I understand
15 why people wouldn't want to be called Nazis, but
16 Americans have a First Amendment right to say that to
17 government officials.

18 So -- and let's look at what their response has
19 been post this event. They've created this no-protest
20 zone, or this protest zone, and presumably outside of
21 the protest zone no free speech activity of any kind is
22 allowed. Presumably, my client if he were to come back
23 to soccer games, and he's not, which is why we're here,
24 could go to the scoreboard area now, the designated
25 protest area, and hold up his sign. He would actually

1 be closer to the field than he would have been -- than
2 he was on that day. So, really, their argument doesn't
3 really make any sense. Again, there's no evidence that
4 Parker --

5 THE COURT: Do you agree that this -- it
6 turns on a limited public forum analysis, and that, it
7 seems to me at the moment, turns on the extent to which
8 adult speech can be limited in that forum; and that, it
9 seems to me, turns on the extent of the scope of the
10 school district's obligation or authority to protect
11 children. Isn't that how the analysis would go?

12 MR. KOLDE: Not in any case I've ever seen,
13 Your Honor. Not in any case I've ever seen. In a
14 limited public forum, there is no viewpoint
15 discrimination.

16 THE COURT: No. No. Assuming it's content,
17 not viewpoint; it's no --

18 MR. KOLDE: What would that be, Your Honor?

19 THE COURT: I agree it's hard -- well, no
20 protest of any kind with respect to transgender
21 athletes playing on school teams.

22 MR. KOLDE: That's viewpoint. That's
23 obviously viewpoint.

24 THE COURT: No, it's content. No. No
25 viewpoint. Not for. Not against. No demonstrations

1 at our school event.

2 MR. KOLDE: But the record is that people
3 have worn Pride pins and have been observed wearing
4 pro-LGBT messages on school grounds. So, I mean,
5 clearly, positive messages are allowed, and we all know
6 this wouldn't have happened if somebody was wearing a
7 Pride pin.

8 THE COURT: I understand that this was a
9 specific restriction tied to the context of the current
10 events; it wasn't -- it wasn't generalized. It was --

11 MR. KOLDE: I would disagree, Your Honor.
12 And I would say that it's clear here that the
13 defendants retaliated against my clients for expressing
14 their speech rights and for talking back to them when
15 they were asked to remove the wristbands. Parker
16 Tirrell --

17 THE COURT: What evidence is there that they
18 opposed the viewpoint? I mean, I think there's a note
19 or something that was sent to all the parents by the
20 athletic director. I agree it wasn't very clear. It
21 wasn't very effective perhaps, but it had something to
22 the effect of, Hey, different viewpoints are perfectly
23 fine, just don't -- as I read it, just don't bring any
24 demonstration to an activity related to this subject.
25 It's all inferential. It refers to that game, but I

1 think we agree, in context, we understand that game was
2 about transgender girls participating in girls' sports,
3 right? Everybody understood that.

4 MR. KOLDE: May I answer the question, Your
5 Honor, or...?

6 THE COURT: Yeah.

7 MR. KOLDE: Okay. So I would say there's a
8 number of pieces of evidence that show that it was
9 viewpoint discrimination.

10 THE COURT: No, no, no. The last question.
11 We all understand and agree, do we not, that the
12 context was this game was significant in that it was a
13 transgender girl playing on a girls' sports team and
14 they were playing in Bow on Tuesday or whatever.

15 MR. KOLDE: That was part of the context and
16 that made the --

17 THE COURT: So I'm trying to, in other words,
18 set a context for the athletic director's e-mail he
19 sent to everybody. When he said, You can have a
20 different view, either side, that's what he was talking
21 about.

22 MR. KOLDE: Yeah, but that's not how they
23 acted.

24 THE COURT: Okay. But do we agree that's
25 what he was talking about?

1 MR. KOLDE: That you can have a different
2 view? No, I think that he didn't mean it because --

3 THE COURT: No. No. You're missing the
4 point.

5 MR. KOLDE: Okay. I'm missing the point.

6 THE COURT: Try again. Do we agree that when
7 he wrote that -- I agree, unspecific, perhaps not
8 effective -- memo to all the parents, when he said, You
9 can have different viewpoints on this and that's okay,
10 do we agree that what he's talking about is transgender
11 girls playing on girls' sports teams?

12 MR. KOLDE: Probably. Probably.

13 THE COURT: Okay. Good. That's all I was
14 trying to get.

15 MR. KOLDE: Okay. Good. But you asked me
16 what is the evidence that this is viewpoint
17 discriminatory.

18 THE COURT: Right.

19 MR. KOLDE: There's several pieces. One, it
20 starts with the e-mail sent by Marcy Kelley several
21 days ahead of time when they say, "We've caught wind of
22 a protest, and we want extra support." So they caught
23 wind of a protest and they understand people are going
24 to express opposition to the inclusion of biological
25 males in female sports. All right? So that's a

1 viewpoint. Clearly, it's a viewpoint. It's viewpoint
2 based. It's only because this one trans player is
3 going to be present there.

4 In the actual no trespass notices that were issued
5 by Marcy Kelley, there is a reference to the speech
6 activities of my clients, which shows that it
7 was the -- their protest, their silent protest, which
8 was the problem. "The reason for this action is your
9 conduct during the girls' varsity soccer game on
10 Tuesday, September 17th, specifically prior to and
11 during the soccer game, you brought and distributed
12 pink armbands to parents and other attendees to protest
13 the participation of a transgender female on the other
14 team."

15 That is absolutely viewpoint. I mean, they put it
16 in writing on an official document. It's in both of
17 the no trespass orders. It's just -- is refutable.
18 And they are proud of it, Your Honor. They think
19 they're right, and they have the right to do this. And
20 you know what? People can disagree, and they can have
21 their view, but my clients have a right to passively
22 express their views on this issue in a way that did not
23 interfere with the game and did not impinge on Parker
24 Tirrell's rights, or anyone else's rights there,
25 because it was an open, public forum.

1 This is viewpoint discrimination. It's
2 automatically --

3 THE COURT: I tend to agree with you and
4 then -- your comment raises, again, that specter of
5 doesn't this factual record require development, and
6 don't factual findings have to be made as to exactly
7 what you described? Was that, in fact, the case, or
8 was it in fact --

9 MR. KOLDE: Not for a TRO and not given that
10 they actually don't dispute that this was viewpoint
11 based. They haven't disputed that and, like I said,
12 they're proud of it, and they said, This is why we did
13 it.

14 I want to address just one other issue because
15 it's part of the posture of why we're here on the TRO,
16 Your Honor. There's limited time left in the season.
17 Some of my clients have already lost the right to be
18 present at numerous games -- in Kyle Fellers' case,
19 five games, to support his daughter. There are five
20 games left in the regular season, including one
21 tonight. Please note that the no trespass order is
22 extraterritorial; it applies to away games also, so he
23 would be risking arrest or extension of that order if
24 he goes to the away game.

25 THE COURT: How does that work? How does the

1 Bow School District prohibit attendance at a
2 Winnacunnet School District game?

3 MR. KOLDE: They may have interlocal
4 agreements. I don't know. "You are also prohibited
5 from attending any Bow School District athletic or
6 extracurricular event on or off school grounds." It
7 applies to away games. That's what they said. And I
8 could not, in good conscience, advise my client to go
9 and get arrested.

10 THE COURT: Right.

11 MR. KOLDE: Okay? So there's a game tonight.
12 There's four more games after this, and, potentially,
13 there's playoffs. So we need short-term relief to
14 allow him to go back to the games. He does want to
15 express his views through passive, silent protests by
16 wearing the pink wristbands. That's the most important
17 part. You know, he would like to also display signs in
18 the parking lot, but the wristbands are the most
19 important part and being able to display them on
20 sidelines.

21 And here's what I think is very important. There
22 is no evidence in the record, and that's because there
23 isn't evidence to that effect, that there are going to
24 be any trans players at any of these games. Okay?
25 Plymouth is not on the schedule. Parker Tirrell --

1 THE COURT: Just so I have your position
2 because I'm writing now --

3 MR. KOLDE: Yeah?

4 THE COURT: -- your position is, your client
5 seeks an injunction that would -- or a restraining
6 order that would permit him to not only attend these
7 games but to protest in support of, or against, the
8 inclusion of transgender girls on girls' sports teams.

9 MR. KOLDE: Yes, and to protest in support of
10 women's sports. There's multiple messages. Part of it
11 is, we want to celebrate women's sports; and part of
12 that celebration is, we don't want, you know,
13 biological men included in competing in women's
14 sports --

15 THE COURT: Right. Okay.

16 MR. KOLDE: -- but passively, by wearing the
17 pink wristband.

18 Importantly, if this is about protecting Parker
19 Tirrell, Parker Tirrell is not going to be there.
20 Parker Tirrell is not going to be at any of the games
21 that are going to be on the schedule. Not tonight.
22 Not at the end of the week. Not through the end of the
23 season. Plymouth is not on the schedule. No evidence
24 that any trans player is going to be there.

25 So if their real goal was to protect Parker

1 Tirrell, that is not met by excluding my client Kyle
2 Fellers or by preventing my other clients from
3 passively expressing their viewpoint by displaying
4 their pink wristband. It does show to me, however, and
5 I would urge the Court to take note of this, that this
6 is punitive, and that is shown by the tone and the
7 actions of Marcy Kelley specifically.

8 She all but admits this in her declaration. She
9 uses very paternalistic language almost like my clients
10 are children in one of her classes. The gist of her
11 response is, Speech has consequences. We told you not
12 to express your views. You didn't listen to us. We
13 saw your pink wristbands, and even though nobody else
14 knew what was going on, we swooped in, asked you nicely
15 to take them off, and then you said mean things to us.
16 You accused us of violating First Amendment rights, and
17 you called us members of a foreign political party not
18 known for tolerating dissent.

19 History, Your Honor, does not always repeat
20 itself, but it does sometimes rhyme. It rhymes here.
21 We are not in New Zealand or Continental Europe.
22 Americans are allowed to engage in speech that
23 government officials disagree with. We're allowed to
24 criticize government officials specifically including
25 in ways that are unkind.

1 Let's engage in a thought experiment. If their
2 speech crackdown was really about protecting Parker
3 Tirrell, why is Kyle Fellers banned from attending
4 soccer games in which Parker Tirrell is not playing in?
5 This is retaliation, First Amendment retaliation.

6 We all know the reason. Marcy Kelley is sending a
7 message: If you cross me, there will be consequences.
8 I'll punish you by keeping you from being able to watch
9 your kid or even picking up your kid. My client can't
10 even pick up his daughter from soccer practice. What
11 does that have to do with protecting Parker Tirrell?
12 Parker Tirrell is not at the Bow High School soccer
13 practice.

14 THE COURT: Was that not modified?

15 MR. KOLDE: No.

16 The day after we filed this lawsuit, they also
17 doubled down on their speech restrictions by appointing
18 a designated protest area by the scoreboard and away
19 from the sidelines. It's wholly unnecessary for a
20 silent protest wearing wristbands. Also doesn't make
21 any sense. Let's say that somebody wanted to protest
22 in favor of trans rights by wearing a Pride flag pin to
23 a girls' cross-country event on the sidelines -- which,
24 by the way, we would defend their right to do that --
25 can't do it under this policy. If you want to do that

1 at a cross-country event, silently express support for
2 trans rights, you have to go to the designated protest
3 area by the soccer field, and you can only do it before
4 and after a girls' soccer game, not during the
5 cross-country event or maybe a swimming event or some
6 other sport. It's clearly targeted at my clients.
7 Just the whole zone is viewpoint discriminatory.

8 If you want to express your support for the
9 Harris/Walz ticket or Kelly Ayotte for Governor by
10 wearing a t-shirt, you can only do it in the designated
11 protest area. You can't wear it anywhere on school
12 property, and you can only do it during girls' -- or
13 right before and after girls' soccer games. Makes no
14 sense.

15 Also, look at the e-mail from Marcy Kelley
16 transmitting the notice, Your Honor. She threatens to
17 suspend soccer games if parents don't comply. She even
18 suggests spectators will be banned altogether, no
19 spectators, even in the complete absence of any other
20 disruption, holding the parents' First Amendment rights
21 hostage to their wish to support their own kids on the
22 athletic field. Why is that? Because she wants to
23 control their speech. The creation of the designated
24 protest area itself is evidence of viewpoint
25 discrimination, as if we needed any more.

1 So I have focused on our request for relief
2 already. We want both the ability for Kyle Fellers to
3 return to the soccer games and to pick his daughter up
4 from soccer practice. We also, in particular, wanted
5 the right to silently and passively protest by wearing
6 the pink wristbands and also by displaying signs in the
7 parking lot.

8 The second component here is that my clients are
9 self-censored, Your Honor. They have been deprived of
10 their right to silently and passively express their
11 support for women's sports. That harm is ongoing,
12 being the right to speak is, per se, irreparable harm.
13 Any reasonable person under these circumstances would
14 not want to risk getting banned or arrested or cause
15 any Bow soccer team to forfeit a playoff spot because
16 Marcy Kelley is unhappy with parents who were
17 expressing a viewpoint that she disagrees with.

18 I think I want to close, Your Honor, by just
19 pointing out the definition of harassment in the *Doe*
20 *vs. Portland Public Schools*, that's the 701 F. Supp 3rd
21 18 at 36, District of Maine case, fairly recent. It
22 quotes from the Merriam-Webster dictionary definition.
23 "Harassment" means to annoy persistently, to create an
24 unpleasant or hostile situation for, especially by
25 invited and unwelcome verbal or physical contact. Goes

1 on to Black's Law Dictionary likewise defines
2 "harassment" as words, conduct or action, usually
3 repeated or persistent; that being directed at a
4 specific person, annoys, alarms or causes substantial
5 emotional distress to that person and serves no
6 legitimate purpose.

7 There is no evidence of any of that in this case.
8 Even they admit that. They talk about speculation
9 about disruption that they feared might happen. They
10 don't actually provide any evidence of disruption; that
11 it actually happened, and any evidence that Parker
12 Tirrell even knew what was going on when my clients
13 were passively expressing their viewpoint on these
14 issues.

15 If the Court doesn't have any further questions,
16 I'll --

17 THE COURT: Just a few, and I probably will
18 later, but whatever the result on the TRO, you know,
19 you included a claim for minor compensatory and nominal
20 damages and so on. That's a jury issue. What I
21 propose is, whatever the result on the TRO, maybe an
22 expedited evidentiary hearing on a preliminary
23 injunction, combine the permanent injunction with the
24 preliminary, do it quickly and get it done. But that
25 would -- you would still have those claims for monetary

1 damages on there. One -- go ahead.

2 MR. KOLDE: Your Honor.

3 THE COURT: I won't confuse it.

4 MR. KOLDE: I do a lot of these; this is my
5 job. Usually, if there's preliminary injunction, not
6 always, but usually people work things out and they
7 resolve it, and we have resolved some cases of minor
8 compensatory damages. My clients have been
9 inconvenienced by this. That's why we put it in there.
10 We're not talking about large dollar amounts.

11 THE COURT: No. No. I know, but it's
12 procedurally a nit. So I'm proposing that whatever the
13 result on the TRO, we have a preliminary injunction
14 hearing reasonably quickly, whenever it's convenient,
15 have an evidentiary hearing, combine the permanent
16 injunction hearing with the preliminary and get it
17 done.

18 MR. KOLDE: We're good with that.

19 THE COURT: You're good with that? Okay.
20 Good. Darn it. I forgot the second one. Let's see.

21 Oh, you have the police officer --

22 MR. KOLDE: Lamy.

23 THE COURT: -- and the NHIAA official, which
24 is fascinating, legally interesting to me probably not
25 to everybody else, but, you know, the NHIAA in New

1 Hampshire is a quasi-state agency with their own
2 defined contours. So I'm not sure how qualified
3 immunity applies or doesn't apply to the soccer
4 official. I'm inclined to think it probably does
5 apply. Do we need to get into any of that? I mean,
6 the police officer -- qualified immunity definitely
7 applies to the police officer; we have to litigate
8 that.

9 MR. KOLDE: Eventually, we would have to get
10 into qualified immunity, Your Honor. I mean, our
11 concern is --

12 THE COURT: It definitely applies to the
13 Board.

14 MR. KOLDE: We would argue that there's --

15 THE COURT: No, I mean, you're talking about
16 \$17.

17 MR. KOLDE: 17.95.

18 THE COURT: Yeah, it doesn't affect the
19 injunctive relief; it just affects the \$17.60 or
20 whatever.

21 MR. KOLDE: That's right.

22 THE COURT: Yeah. Keep that in mind. Your
23 clients probably -- maybe they don't care about the
24 expense, but you probably don't want to spend that kind
25 of money to litigate that issue.

1 MR. KOLDE: Well, we do deal with qualified
2 immunity all the time. My clients are represented pro
3 bono; we represent all of our clients pro bono. So we
4 are a donor-supported organization.

5 THE COURT: Please don't tell me you're
6 talking about litigating qualified immunity for \$17.

7 MR. KOLDE: Well, right now, that's our
8 claim, Your Honor. But we think that people -- we
9 think that people ought to know that there is no --

10 THE COURT: But it doesn't affect the
11 injunctive relief.

12 MR. KOLDE: It does not affect injunctive
13 relief at all. Qualified immunity has no effect on
14 injunctive -- declaratory relief.

15 THE COURT: It's only the \$17.

16 MR. KOLDE: Yeah. And, look. If we get --
17 our main focus is on --

18 THE COURT: How about if I give you the \$17?

19 MR. KOLDE: If they write us a check for
20 \$17 --

21 THE COURT: No, I'll do it.

22 MR. KOLDE: We don't want it from you, Your
23 Honor.

24 THE COURT: It's the hearing.

25 MR. KOLDE: We would like the injunction.

1 THE COURT: Okay.

2 MR. KOLDE: We would like the injunction.

3 That matters to us the most, we can see about the other
4 claims if we get the injunction.

5 THE COURT: Thank you, Mr. Kolde. And if you
6 have rebuttal, I'll allow that.

7 MR. KOLDE: Thank you, Your Honor.

8 THE COURT: All right. Mr. Cullen.

9 MR. CULLEN: Thank you, Your Honor. I'm here
10 with Superintendent Marcy Kelley, and my colleague,
11 John Shirley. And I think you said at the very
12 beginning of this that context matters, and I think
13 context does matter here.

14 THE COURT: Well, let's start out, if you
15 don't mind, both of you rely heavily in your briefing
16 in *Tinker*. I don't think it's a *Tinker* analysis, is
17 it? It's a limited public forum analysis.

18 MR. CULLEN: I think the way you explained it
19 is the right steps -- that you look first at limited
20 public forum, and then you look to *Tinker* to see, and
21 most importantly now the *L.M. vs. Middleborough* case to
22 determine within that limited forum step what the
23 school can do and can't do. So I think you're right in
24 that it informs the Court as to the propriety of what
25 they were doing, and that's where the context here

1 really does matter.

2 Here, the context is, you know, noticeably absent
3 protest the plaintiff's papers -- and, incidentally, I
4 was kind of looking over --

5 THE COURT: Sorry. I apologize. It's my
6 habit to interrupt --

7 MR. CULLEN: It's your court.

8 THE COURT: -- and I apologize.

9 All right. So we're in agreement, both parties
10 are in agreement, that it's not a *Tinker* analysis; it's
11 a limited public forum analysis. Right?

12 MR. CULLEN: Yes, I believe that's true.

13 THE COURT: Okay. Let's go.

14 MR. CULLEN: Here, I think still the facts
15 matter. And a little aside, I noted that it sounded
16 like Plaintiff, it sounded like he was reading from my
17 client's declaration, but he was not. I don't know
18 where all that stuff came in that Marcy Kelley
19 admitting that she's out to get kids and -- you know, I
20 don't know where -- I trust that the Court understood
21 that that was sort of a riff, and not actually text.

22 THE COURT: I took it as argument.

23 MR. CULLEN: Yeah. So -- but going back to
24 the context, as this Court is aware the *Tirrell*
25 decision came out on the preliminary injunction on the

1 10th. On the 11th, Mr. Desilets specifically has
2 attested that he heard that there was talk at the last
3 game that there was going to be a protest that could
4 even involve, you know, potentially heckling and other
5 things. And so for them to say this has nothing to do
6 with the trans athlete; this has everything to do -- is
7 farcical. But even on the morning of -- and this is
8 Desilets' Exhibit A, which is Document 22-2, Your
9 Honor. Anthony Foote, the plaintiff, writes -- and
10 this is in the second paragraph, "This isn't just
11 another game, not by a long shot. None of you had a
12 single conversation with our team. None. You ignored
13 us, and now you expect us to go along with this." That
14 was noticeably absent from the plaintiff's discussion
15 of the events where he tried to suggest to you that
16 this was nothing -- this wasn't just another game --
17 that this was just another game; this was just
18 something they just wanted to come out and protest. So
19 I think it's important that that is the context. This
20 is at 7:28 a.m. that morning, and that is in the shadow
21 of the prior information that they had about the
22 possibility of the protest.

23 So I think when it comes down to the actual
24 actions on the 17th, what the school did was
25 entirely -- was entirely appropriate and even compelled

1 in order to protect a trans student; in this case, a
2 player on the other side.

3 THE COURT: Protect them from what?

4 MR. CULLEN: Well, protect them from
5 harassment and disruption of their -- of their
6 educational development.

7 THE COURT: And how is wearing a pink tennis
8 wristband with two Xs on it harassing?

9 MR. CULLEN: So there's two aspects to this,
10 first of all, Your Honor, for me to answer that. First
11 of all, let's just take a look at these wristbands if
12 we can because they're not just pink XX wristbands;
13 they're wristbands with the word "NAD" written on them.
14 It's interesting that they constantly refer to these as
15 just pink wristbands, but they're not. These are
16 clearly anti-trans messages.

17 The other thing is that -- at least on the 17th --

18 THE COURT: Are they understood -- again,
19 another factual issue. Are they understood as
20 anti-trans, whatever that might mean, as opposed to
21 transgender girls should not be playing on girls'
22 sports teams?

23 MR. CULLEN: As you say, I think that
24 probably needs further development. I know that the
25 plaintiff was concerned that he only got our papers

1 yesterday afternoon, neglecting to point out that he
2 only filed his TRO Friday afternoon himself.

3 THE COURT: I mean, I would be curious to
4 know, what's the common understanding and
5 interpretation of that? We can all put our own on it,
6 but what is the common understanding and interpretation
7 of those symbols?

8 MR. CULLEN: My understanding is that the
9 "NAD" is that it is short for gonad, and that's not a
10 supportive -- that's not a term that's put out there to
11 support female soccer players.

12 The XX, I think, has been used in the past --

13 THE COURT: You know, one person's support is
14 another person's challenge. So that's not helpful.

15 The question is: What is it that the school
16 district is trying to control here? What -- what is
17 it? It's clearly speech, right? Colored speech. What
18 is the basis for suppressing that speech?

19 MR. CULLEN: It's the same as the First
20 Circuit outlined in the *L.M.* case; it is the protection
21 of a protected class against the -- and this is where
22 *Tinker* does play, because it talks about, and
23 illustrates for us, that there are limitations that can
24 be there where either there's going to be a disruption
25 or where it's going to collide with the interest of

1 others, and this is where it collides -- it certainly
2 collides with the interest of others. L.M. obviously
3 took the disruption path and said you don't need to
4 have a physical disruption; you don't have to have
5 mayhem on the sidelines. It disrupts the students'
6 educational progress. We cited the -- didn't have a
7 lot of time, but we cited one CDC study that talked
8 about how LGBTQ students have higher rates of
9 depression.

10 THE COURT: Again, I mean no criticism when I
11 suggest these aren't factually or legally developed
12 sufficiently, because these are very nuanced in my view
13 and complicated issues.

14 Surely, it is not harmful to a transgender student
15 playing on a girls' team to know that there are a group
16 of people out there -- they don't hate transgender,
17 they're not bigoted in that sense, but for reasons of
18 sports challenge concepts or whatever, they don't think
19 that a transgender girl should be playing on a girls'
20 team. That's not an illegitimate point of view. It's
21 not an inherently bigoted point of view or hateful
22 point of view, is it? There are a lot of experts that
23 agree with that.

24 MR. CULLEN: I don't see how it's any
25 significantly -- how it has any difference from the

1 "there are only two genders." I'm sure the plaintiffs
2 in that case made the exact argument that you're
3 suggesting. And the First Circuit said, no --

4 THE COURT: You don't see a difference there?
5 I see a difference there.

6 MR. CULLEN: Well, I think --

7 THE COURT: There are only two genders,
8 you're not a real person to the extent that you claim
9 to be this or that, as opposed to biological males
10 shouldn't be playing on girls' teams for reasons of
11 muscle, strengths, speed, whatever, whatever. I mean,
12 is that -- is that harmful to a student to know that
13 there's a group out there that thinks that? Is that
14 harassing? Is that intimidating? Is that threatening
15 in some way?

16 MR. CULLEN: I think it has no place on the
17 sideline of a game --

18 THE COURT: That's a different state. That
19 doesn't count. You can't suppress free speech based
20 upon the fact that you think it's inappropriate.

21 MR. CULLEN: But the location matters as
22 well.

23 THE COURT: Well, that's why I asked the
24 question. What's the extent of the district's power to
25 limit speech? It has to be legitimately related to

1 some cognizable problem, right?

2 MR. CULLEN: Right.

3 THE COURT: What is it? What's the problem,
4 and what is it that you're limiting it for?

5 MR. CULLEN: The cognizable problem in this
6 case is exactly what was laid out in the *Middleborough*
7 case. It's students' ability to develop, students'
8 ability to learn, the difficulty that students face
9 when they suffer harassment. That's what *Middleborough*
10 said. I've seen -- that case was further along than
11 this one, and there was a lot more opportunity to
12 develop some of those issues, but that's -- you know,
13 that's the same issue that *Middleborough* the First
14 Circuit said was a legitimate concern for the school,
15 and that they could legitimately want to protect that.

16 THE COURT: What's the extent -- I'm having a
17 hard time identifying the extent of the limitation put
18 on the speech. What was the limitation?

19 MR. CULLEN: The limitation was that they
20 couldn't come out and protest with their -- they
21 couldn't come out and protest on the sidelines of the
22 game.

23 THE COURT: Where does that come from? I've
24 looked at Mr. Desilets' e-mail and the attachment and
25 the school's policy, and I don't see anything there

1 that's that specific.

2 MR. CULLEN: Well, I think when they
3 specifically said -- well, they went up and asked them
4 to stop, so --

5 THE COURT: No. No. But the school district
6 says, You're wearing these bands; you can't wear the
7 bands. You've been put on -- you've even been put on
8 notice that you can't wear the bands. So I look at the
9 record and say, Okay, where's that? So I ask you:
10 Where's that?

11 MR. CULLEN: I don't think there's anything
12 in the record and I don't think there will be anything
13 in the record that says that the Footes or Mr. Fellers
14 were specifically on notice that they couldn't wear
15 these armbands, but they were --

16 THE COURT: Okay. So back up a step of
17 generality. You can't protest.

18 MR. CULLEN: Right.

19 THE COURT: Protest what? Protest
20 transgender girls playing on girls' teams, because I
21 don't see that?

22 MR. CULLEN: Yeah. You can't come to this
23 game and bring your protest to this game. It doesn't
24 have to be that; it --

25 THE COURT: Where does it say that? Where is

1 that noticed? In other words, point to the authority
2 that you're using to say you can't do that.

3 MR. CULLEN: If the school had already come
4 up with a policy that night and wrote it, it wouldn't
5 make any difference. The fact is they said, you can't
6 protest and then they went up and they informed Foote
7 and Fellers, like, look, you gotta take off the bands.
8 That's the notice. They could have taken off the bands
9 then; they didn't.

10 THE COURT: I know. I guess I'm looking for
11 the -- one of the issues of that, I think the principal
12 issue in this case is, what's the extent of the school
13 district's authority to limit speech at a school soccer
14 game? What's the extent of it? And where does it --
15 where are they pointing to say this violates this
16 policy? It can't just be arbitrary, right? It can't
17 just be the school board member walking around saying,
18 I don't like that; take it off. Can't be that.

19 MR. CULLEN: I think -- it can't be that,
20 but, Your Honor, at the time of the game, if the person
21 comes up and tells you, you gotta remove something,
22 that's not the time to get into an argument on the
23 sideline with the people. The time to do that is to go
24 back --

25 THE COURT: That may be. But that begs the

1 question: Do you have the right to have that armband
2 on?

3 MR. CULLEN: I don't think you do have a
4 right to have that armband.

5 THE COURT: Why?

6 MR. CULLEN: Because it's clearly out there,
7 and they admit as much in their papers and, in fact,
8 the plaintiffs' counsel admitted as much that this is
9 not just supportive; it's also against trans. It's a
10 symbol --

11 THE COURT: Is it okay to be for transgender
12 girls playing on girls' teams? Is it correct for
13 Mr. Kolde to argue that if it was an LGBTQ-supportive
14 wristband, that would be okay; nobody would have said,
15 "Take it off."

16 MR. CULLEN: We wouldn't allow to have
17 protests one way or the other on this issue.

18 THE COURT: Okay. That's a different
19 argument. Where do I find that? Where is it that I
20 can look at your policies and say, This is viewpoint
21 neutral? This is content -- this is just no
22 demonstrations, no protests? Where?

23 MR. CULLEN: This is where Plaintiffs want to
24 sidetrack, and I understand where the Court is going
25 with this. But you can have bans -- and we regularly

1 do have bans -- on, like, the no-gender shirt, two
2 gender shirts, or things that are against other
3 minorities, like, based on race or religion or other
4 things, and we have those. And we don't have -- we
5 can't necessarily identify every single thing before it
6 happens. You have to let the -- you have to let the
7 schools decide, within the context of our school, how
8 does this impact our students? The school has trans
9 students; it's not just Parker Tirrell here.

10 THE COURT: In an evidentiary hearing, can
11 you make a proffer as to what the school authorities
12 would testify to with respect to this particular --
13 these particular bans?

14 MR. CULLEN: I'm not sure what you're asking,
15 Your Honor.

16 THE COURT: Why does this ban transgress the
17 school policy? What school policy does it transgress
18 and in what way?

19 MR. CULLEN: I believe that the school would
20 attest that this violates the school policy against
21 discriminating against students, and that this
22 discriminates against trans students who, we understand
23 by this Court's ruling, to be a protected group.

24 THE COURT: So it is viewpoint?

25 MR. CULLEN: I think every case that comes

1 down to protecting a protected class has a viewpoint
2 aspect to it because that's -- those are the people who
3 are being attacked, but we would not let -- we would
4 not let students come to the game and hold up big signs
5 and say, you know, "trans rights are human rights" or
6 things like that. This is not the forum for that. It
7 is a limited public forum, and it's open for the
8 purpose of letting invitees come in and watch the game.

9 THE COURT: That's kind of what I was getting
10 at. Would the proffer of testimony be that you
11 wouldn't have allowed that either?

12 MR. CULLEN: Wouldn't have allowed the signs?

13 THE COURT: Yeah. Supporting transgender
14 rights --

15 MR. CULLEN: Yes, Your Honor. That is it.
16 We would not allow that either. This is not -- this is
17 not a public forum.

18 THE COURT: How would you justify that?

19 MR. CULLEN: For the same reason.

20 THE COURT: That wouldn't be harassing; that
21 would be something else.

22 MR. CULLEN: That would be that this public
23 forum was open for one purpose, and that's to come out
24 and watch the game and see your kids play, and that's
25 why people can come to the games and that's what they

1 can do. This isn't the place to argue about the
2 budget. This isn't the place to argue about other
3 things. This is the place that's open for one purpose.
4 And that's what the cases say on limited public forum;
5 that we have to focus on, what is the public forum open
6 for. If it's a school board meeting, it's open to
7 discuss school issues. If it's a soccer game, it's not
8 the place to have those.

9 THE COURT: Okay. Is -- was that silent
10 protest, if you will, within or without the scope of
11 the activity?

12 MR. CULLEN: It's without the scope of the
13 activity.

14 THE COURT: Why is that?

15 MR. CULLEN: Because the whole purpose was to
16 target this one student and they admit as much.

17 THE COURT: You agree that's a factual issue
18 as well?

19 MR. CULLEN: Sure.

20 THE COURT: They say it wasn't; you say it
21 was. What's the evidence that it was?

22 MR. CULLEN: I think the evidence is right
23 here. This is -- you know, you ignored us; now you
24 expect us to just go along with this. I'm leader, and
25 a real leader doesn't stand by while players are thrown

1 in harm's way. Stand up for women, for real women, or
2 get out of the way. I mean, that's where it comes
3 from. Plus the Facebook posts that I think are already
4 in the record as well. I mean, this is --

5 THE COURT: But isn't that -- isn't that
6 issue-oriented? I don't see it -- what's the argument
7 that it's targeted to this particular player? In other
8 words, the school district's position, I assume, is,
9 Look, we have a duty to protect this player, and this
10 was an assault on this player; this was some sort of
11 intimidation or harassment of that player.

12 MR. CULLEN: I guess I would ask if the
13 words, "This isn't just another game," don't have
14 anything to do with the fact that Parker Tirrell is
15 playing in that game, what do they mean?

16 THE COURT: I'm missing the point.

17 MR. CULLEN: I think it's --

18 THE COURT: Their position is, we are
19 against, in principle, transgender girls playing on
20 girls' teams. Your position is, no, you were there to
21 harass and intimidate a particular player and students
22 in general with this sort of anti-transgender
23 identity-challenging protest.

24 MR. CULLEN: Yeah. And that's the exact type
25 of thing that the courts regularly let administrators

1 make those determinations.

2 THE COURT: Well, they do in student
3 contexts, but I haven't found a single case, any case,
4 where an adult invitee to an open, public forum was
5 told that they couldn't express a passive political
6 view. I haven't found one.

7 MR. CULLEN: Right. Well, I would suggest,
8 Your Honor, that students -- you had mentioned the
9 rights are different. I would say that students
10 arguably would have more rights because they're
11 compelled to be in school from 8 a.m. to 3 p.m.; the
12 parents don't have to be there.

13 THE COURT: Their rights to free speech are
14 more limited, not less limited.

15 MR. CULLEN: Sorry?

16 THE COURT: Their rights to free speech,
17 students, are more limited.

18 MR. CULLEN: Within the school building. But
19 here, the parents are people who have been invited in;
20 they're invitees for a limit purpose, and they're
21 invitees to a limited purpose forum. They can speak
22 all they want. They can go across the street. They
23 can go -- Nicole Foote came in and met with Mike
24 Desilets before the game. They have lots of
25 opportunities to express their opinion. This forum was

1 not opened for them to express anti-trans or anti-Black
2 or pro-trans. It's just not open for those purposes.

3 THE COURT: I haven't seen that in the
4 policies that I've seen or the athletic manual, the
5 excerpts that I've seen, or in the affidavits that I've
6 seen.

7 MR. CULLEN: Right.

8 THE COURT: I've seen -- I've seen
9 restrictions based upon harassment, intimidation,
10 threats, even bad sportsmanship, I guess, but I haven't
11 seen that. Where would that -- I know what you're
12 saying is it's just inherently everyone understands it.

13 MR. CULLEN: No. Your Honor, I don't think
14 you're asking them to go back and think to the
15 beginning of school, What are the possible things that
16 can come up this year?

17 THE COURT: No. I'm asking, if you made an
18 evidentiary proffer, I'm asking what the evidence would
19 be and who determined that wearing pink -- these pink
20 wristbands represented speech that was outside the
21 scope of the activity, the purpose for which the forum
22 was being used? Who decided that, and why would they
23 decide that? How did they decide that? It's viewpoint
24 neutral. It's gotta be viewpoint neutral.

25 MR. CULLEN: I'm not 100 percent sure that's

1 accurate, Your Honor, because there's lots of things
2 that we limit people from doing because it's hate
3 speech. You can -- that's just -- you know, we limit
4 hate speech.

5 THE COURT: Well, I thought we covered that
6 already. I do not think, as a matter of social-legal
7 policy, that transgender girls should participate on
8 girls' high school sports teams. That's not hate
9 speech.

10 MR. CULLEN: I'm not suggesting it is. What
11 I'm suggesting to you, Your Honor, is there are certain
12 types of speech that you could always argue is really
13 just a viewpoint, but we still don't allow it. We
14 don't allow people to yell at the referees about, you
15 know, their calls. We don't allow them to call the
16 referees names. We don't -- that's -- we just don't
17 allow that sort of conduct. We don't allow conduct
18 that's targeted at individuals, whether we think of
19 this as harassment, which I think it is. And also keep
20 in mind, of course, that on that day in particular, the
21 school doesn't have to wait to see whether the other
22 things that have been predicted are going to come to
23 pass, and then the damage is done. They see this
24 happening -- but going back to your question: When was
25 the policy made? The school isn't going to be able to

1 predict what the next thing to happen is. Each year
2 something new comes up -- but, but, but -- sorry. I
3 apologize.

4 THE COURT: Yeah. But legally your answer
5 has to be something like, we have the authority to
6 limit speech in this limited public forum on grounds
7 that... has to be that. And, by the way, it's
8 viewpoint neutral.

9 MR. CULLEN: Right. I think it's the night
10 before or a couple days before, I think maybe the 13th,
11 when Mr. Foote posts his picture of the variety of
12 wristbands. And, you know, in the context of hearing
13 that there's going to be some sort of protest that
14 could include heckling, yeah, they come to an agreement
15 that, We're not going to allow this. And then they go
16 to the game and they wait, and when they see the
17 wristbands they're like, Okay. Second half apparently
18 that's when the protest is going to be, and they
19 correctly shut it down, again, because this is not the
20 forum for that. They had other forums. They used
21 other forums to convey their messages. This is just
22 not the forum.

23 THE COURT: Do you contend it was disruptive?

24 MR. CULLEN: I would say that under *L.M.*,
25 it -- no. The silent was not disruptive as to

1 disrupting the game. It wasn't physically disruptive.
2 But under the *L.M.-Middleborough* case, this type of
3 message is disruptive to a student's development, and
4 the First Circuit said that is a category of disruption
5 that the Court should be considering. We don't have to
6 have a melee on the sideline to characterize something
7 as disruptive, according to the First Circuit. I
8 didn't make it up.

9 THE COURT: Okay. Once again, I think -- I
10 mean, Mr. Kolde agrees, I think, that if this protest
11 was aimed at that student, or trans students in
12 general, that would be a problem, but it wasn't.

13 You say context says it was. We're not here. We
14 have bare evidentiary proffers. Doesn't that require a
15 factual, complete developed record? Isn't that the
16 turning point pretty much?

17 MR. CULLEN: Yeah. If we need to have that,
18 then we should schedule something, ideally, not this
19 week since I just canceled my flight to Ireland last
20 night so I could be here today, but maybe early next
21 week.

22 THE COURT: I was going to let you decide
23 between counsel when it's convenient for you. But
24 that's what's troubling me. I don't think you can make
25 these decisions without a factually developed record.

1 MR. CULLEN: There's certainly -- there's no
2 reason that this had to be teed up on a Friday
3 afternoon for a Tuesday afternoon hearing. There was
4 time. In the plaintiffs' case in *Tirrell*, they filed a
5 motion, and they filed a TRO, and they filed it all
6 together. As the plaintiffs say, there have been, you
7 know, nearly a half a dozen games since these -- since
8 the trespass orders went into effect. So I agree with
9 you. We may need a further hearing.

10 THE COURT: I'm taking a wild guess, but you
11 would oppose -- you would oppose a limited TRO allowing
12 the plaintiffs to attend games wearing the pink
13 wristbands?

14 MR. CULLEN: I would, Your Honor, but I want
15 to also carve out --

16 THE COURT: Just I'm --

17 MR. CULLEN: I apologize.

18 THE COURT: Mr. Kolde, your position is
19 pretty hard: They're not going to go to the games
20 without the wristbands?

21 MR. KOLDE: Well, Mr. Foote and Mrs. Foote
22 have been going to the games but not wearing the
23 wristbands because they don't want to have another no
24 trespass.

25 THE COURT: Well, they're expired, right?

1 MR. KOLDE: Yes. But they're not wearing
2 them out in the open; they're wearing them under
3 clothing.

4 THE COURT: So they have a choice. But
5 Mr. Fellers does not have a choice.

6 MR. KOLDE: He does not have a choice. He
7 wants to both go, and he also wants to express his
8 right quietly.

9 THE COURT: Okay. But I guess they're not
10 going to agree they can go wearing the wristband.

11 MR. CULLEN: Absolutely not, and that's
12 because of his conduct after this. If he just complied
13 and put his thing away, or if he had just protested in
14 the way that Mr. Foote did, but he left the game. He
15 went out, he held up a sign. He says he could see the
16 game from where he was watching it, so he said, I went
17 back and I moved my car to a position where I could
18 watch the game, so the people in the game could see him
19 out there holding up his sign as well, presumably. And
20 on top of it, the police officers went -- and this is
21 in the record. The police officer went and asked him
22 to leave, and he didn't.

23 So I think Mr. Fellers, you know, has made his own
24 bed here. He could have complied with all of the
25 things, and then he would be going to the games with

1 Mr. Foote, but he didn't. And, again, this is where, I
2 think in *Hendrickson*, this Court -- in fact, I believe
3 it was you, Your Honor -- specifically recognized that,
4 you know, Courts have to be -- have to give some
5 deference to the administrators on how they're going to
6 sanction people; otherwise, you're more than welcome to
7 come to the game tonight and make these decisions
8 yourself, Your Honor.

9 THE COURT: That was something else I wanted
10 to -- as I read the record, there's no dispute the
11 trespass order to Mr. Fellers is based upon more than
12 wearing the wristband and refusing to take it off; it's
13 the subsequent conduct, right?

14 MR. CULLEN: Yes.

15 THE COURT: In evidence is going to be that
16 the body cam footage from the officers?

17 MR. CULLEN: Yes, Your Honor. Now, if the
18 Court permits us to use the body cam, and I would love
19 to, I just -- there's a statute that restricts our
20 ability that's not subject to 91(a). We can't just
21 willy-nilly turn it over, but with a court order, we
22 can certainly produce it to the Court and to counsel.

23 THE COURT: I don't know if the issue is
24 contested. Is it contested that the trespass order is
25 not just a function of the speech; it's a function of

1 the conduct after the speech?

2 MR. KOLDE: We would say it's all about the
3 speech, Your Honor. They're calling it conduct, but
4 they didn't like the speech. Everything he did was
5 speech.

6 THE COURT: That may be true, but you still
7 can't refuse the lawful directive of a police officer
8 to leave, and you can't be disorderly and all that, in
9 an enhanced --

10 MR. KOLDE: Holding up a sign quietly is --

11 THE COURT: No. No. Refusing to leave,
12 creating a commotion, being disorderly, disrupting the
13 game.

14 MR. KOLDE: It's absurd.

15 THE COURT: That you have a First Amendment
16 right to wear a wristband is not a license to misbehave
17 thereafter because somebody wrongfully tells you to
18 take it off. You still can't misbehave.

19 MR. KOLDE: Misbehave by what; by staying
20 there?

21 THE COURT: Disorderly conduct, refusing the
22 order of a police officer.

23 MR. KOLDE: He called the school officials
24 Nazis and said his First Amendment rights were being
25 violated.

1 THE COURT: I don't think that's a problem.

2 MR. KOLDE: What's wrong with that?

3 THE COURT: I don't think that's a problem,
4 but I think it might be a problem if you behave in a
5 loud, boisterous, disruptive way that disrupts the
6 activity for which the property is being used, and
7 refusing -- if the police officer told him to leave the
8 property, it's a problem if he didn't leave.

9 MR. KOLDE: He did leave. He did leave.

10 THE COURT: I don't know. I'm just here
11 reading your papers, which I find kind of insufficient.

12 MR. KOLDE: He loudly said, "You're violating
13 my First Amendment rights."

14 THE COURT: No. No. No. You're saying he
15 didn't leave; they say he did leave. I don't know
16 whether he left or not. That's an evidentiary matter
17 that's going to have to be developed. Right? But if,
18 in fact, he disobeyed the order of a police officer to
19 leave, that they wrongfully told him to remove the
20 wristband doesn't excuse that subsequent conduct,
21 right? And, therefore, that subsequent conduct, it's
22 not excused, would justify a longer no trespass order,
23 right?

24 MR. KOLDE: I'm not sure about that, Your
25 Honor.

1 THE COURT: Well, I'm sure about that. I
2 just don't know what the facts are.

3 MR. KOLDE: So -- yeah, I mean -- I have some
4 things to say when he's done, but he has the floor,
5 I'll sit down.

6 MR. CULLEN: I'm happy to give up the desk.
7 On the irreparable harm, I noted that the plaintiffs --

8 THE COURT: Well, suppression of free speech
9 rights is irreparable harm, so no issue there. It's --
10 the question is, likelihood of success on the merits,
11 it seems to me.

12 And, you know, this is no criticism -- seriously,
13 it's no criticism because this is all an accelerated
14 process, but the briefs simply don't address the proper
15 legal standard to be applied here. I think we agreed
16 between the parties here that it's not *Tinker*. You can
17 waste a lot of time on *Tinker*. It's limited public
18 forum analysis. There's a Sixth Circuit case by the
19 way, if you care, on it that lays it out pretty well, I
20 think. It hasn't been widely adopted, but it's pretty
21 persuasive.

22 That then turns to, Well, are you likely to
23 succeed on the merits? I don't know, because it is a
24 limited public forum as you agree, Mr. Kolde, and that
25 means they can limit the speech to the activity

1 involved that isn't viewpoint discriminatory.

2 You say it's viewpoint discriminatory; they say
3 it's not; it's student protected. Not many people
4 discuss the *L.M.* case in too much detail, but *L.M.* does
5 suggest that protecting the personal identity of
6 students who are vulnerable, particularly students, is
7 a legitimate obligation of the school district. Title
8 9 suggests that the school district is obligated to
9 prevent harassment of students particularly engaged in
10 student activity.

11 Was this wearing of the band a protest within the
12 context with a lot of extra meaning? Don't know. Was
13 the ability of the school district sufficient to
14 require removal of it? Don't know. Requires a factual
15 determination based on evidence. These proffers,
16 insufficient; factual development, insufficient; legal
17 development, insufficient. Again, not a criticism.

18 So I'm not prepared -- I can't -- at best, I would
19 say it's a push. Is your case illegitimate? Of course
20 not. Do you have merit? I think you do. Does the
21 school district have merit? I think they do. It's
22 going to depend on the evidence, I think, and it's
23 going to depend on the factual findings.

24 So I think I'm going to deny the TRO for that
25 reason, failure to establish likelihood of success on

1 the merits for all the reasons I've just articulated.
2 So I think we need to schedule a preliminary injunction
3 hearing, an evidentiary hearing. I'm going to combine
4 the permanent injunction hearing with the preliminary
5 injunction hearing. Whatever is convenient for you.
6 You might talk, by the way. Counsel, you might talk.
7 Maybe Mr. Fellers would like to go see his daughter
8 play at soccer without wearing the wristband.

9 MR. KOLDE: Your Honor, I did actually have a
10 few things I had wanted to say in response, but the
11 Court's ruled.

12 THE COURT: I'm sorry. You did. You did.

13 MR. KOLDE: Can I just make my record on
14 these things?

15 THE COURT: Oh, sure, of course. I'm sorry.

16 MR. KOLDE: Look, Your Honor --

17 THE COURT: But, you know, it might help if
18 you just address the points that I'm concerned about,
19 the lack of factual development and legal development.

20 MR. KOLDE: Okay. Well, Your Honor, I would
21 say on the key facts, the parties actually agree on a
22 lot of the key facts.

23 THE COURT: They do.

24 MR. KOLDE: You know, they changed the
25 subject, which is what good defense attorneys do. I

1 used to be a defense attorney myself defending the
2 Government. And we cited the correct standard, which
3 is it's a limited public forum. Okay? They have
4 doubled down on viewpoint discrimination. They have
5 said it's specifically the viewpoint that's being
6 represented. There's per se illegal. There's no
7 factual development that needs to be made on that.
8 They have admitted to engaging in viewpoint
9 discrimination. They haven't really responded to that,
10 Your Honor.

11 THE COURT: Well, their argument is that
12 under *L.M.* case, it's a legitimate -- and maybe the
13 duty of the school district to protect vulnerable
14 students from harassment, intimidation in the nature of
15 challenging the characteristics that are associated
16 with their personal identity; that that creates a lot
17 of harm. Read the *L.M.* trial.

18 MR. KOLDE: I've read the *L.M.* case.

19 THE COURT: Yeah. That's their theory --
20 it's student protection.

21 MR. KOLDE: That's a *Tinker*-based case
22 analysis. *L.M.* is a *Tinker* case. 100 percent, it's a
23 *Tinker* case.

24 THE COURT: It is a *Tinker* case, but *Tinker*
25 does seem to establish the nature of the school-student

1 relationship that requires the school board's action to
2 protect.

3 MR. KOLDE: Yeah, but my clients are not
4 students, Your Honor, and that's the whole point of our
5 argument, and the Court understands that. Your Honor
6 came out at the beginning and said, I don't think
7 *Tinker* applies. If *Tinker* doesn't apply --

8 THE COURT: Analysis. The *Tinker* analysis
9 does not apply.

10 MR. KOLDE: -- then *L.M.* doesn't apply
11 either. *L.M.* is a *Tinker* analysis. It's all over that
12 opinion. They clearly follow *Tinker* in that case. I
13 happen to disagree with the result there. I hope
14 SCOTUS flips it. We'll see. Ser --

15 THE COURT: I'm relying on it more. Their
16 defense is, We have -- we have the ability and right to
17 limit a public forum discussion to germane topics, and
18 this is not a germane topic. And not only is it not a
19 germane topic, it's a topic that can likely inflict
20 harm on vulnerable students, therefore, we exercise our
21 right in our forum to prohibit it. That's what they're
22 saying.

23 The legal analysis of that claim: Insufficiently
24 litigated, insufficiently briefed, so you need to brief
25 it. Factual development, I don't know if that was

1 their reason. I don't know if this was -- posed a risk
2 of that. You argue that, you know, it didn't pose any
3 risk of such a thing. I don't know. We'll have to
4 have an evidentiary hearing, and those issues will have
5 to be resolved.

6 MR. KOLDE: Okay, Your Honor. I mean, I
7 guess I had some other things to say, but I kind of
8 feel like the writing is on the wall. Do you want to
9 hear from me on those things?

10 THE COURT: Sure. No, I would. It's
11 helpful.

12 MR. KOLDE: So I think on Foote -- actually,
13 let me change the feed here. All right.

14 So I think addressing the Court's question about,
15 you know, who was this directed at. My client, about
16 four days before the September 17th game, did have a
17 Facebook post. And he explains his view -- and this is
18 just speaking for him, not necessarily the other
19 plaintiffs, that, you know, despite Governor Sununu's
20 stance on protecting female athletes, the Federal Court
21 has failed to enforce this decision leaving our girls
22 vulnerable. While it's not the athletes' fault --
23 skipping ahead -- the failure to uphold the governor's
24 decision by the legal system, the school board and
25 school administration is setting a dangerous precedent

1 for women's sports.

2 They're allowed to express that opinion. It's
3 directed at all of those public bodies which they're
4 allowed to direct their speech at. There's clearly
5 nothing directed here specifically at Parker Tirrell or
6 any other trans student.

7 These armbands -- and this is somewhat a
8 scurrilous tactic by the defendants to put up these
9 armbands. The evidence, and the parties agree on this,
10 is that pink armbands -- wristbands, rather, with XX
11 were worn. The "NAD" comment, that, by the way, means
12 "Not a Dude." I would argue there's nothing offensive
13 about it, but nobody wore a "NAD" wristband. Okay?
14 There's just no evidence of that in the record. So
15 they're reaching and grasping here, trying to find some
16 evidence of something that looks iffy or, you know,
17 crass. How can wearing a pink wristband with the
18 female chromosomes be offensive?

19 THE COURT: Harmful to students engaged in a
20 student activity.

21 MR. KOLDE: It's ridiculous.

22 THE COURT: Transgender -- well *L.M.* -- the
23 Court of Appeals in *L.M.* didn't think it was
24 ridiculous. They thought it was harmful. It was a
25 t-shirt. XX, there's only XX or something?

1 MR. KOLDE: No. It said "there's two
2 genders."

3 THE COURT: "Only two genders," that's right.
4 And then crossed out the only two genders and just put
5 XX and put "censored." Yeah. The Court of Appeals
6 said, Yeah, that's bad; the school district gets to
7 regulate that.

8 MR. KOLDE: In the school context by a school
9 context.

10 THE COURT: You took the words right out of
11 my mouth.

12 MR. KOLDE: Correct.

13 THE COURT: And this is an adult case and the
14 rights are more extensive, but the question is, of
15 course, how more extensive? How far out does it go?
16 Do we reach a point where, first, you have to decide
17 whether what your clients were wearing falls into the
18 category of the XX t-shirt in *L.M.*, and then you have
19 to decide whether or not that falls short of where an
20 adult's free speech rights begin or whether it eclipses
21 the adult's free speech rights in a limited forum.
22 Right? These are nuanced questions; these aren't easy
23 questions.

24 MR. KOLDE: Not when there's viewpoint
25 discrimination, Your Honor.

1 THE COURT: Well --

2 MR. KOLDE: They haven't even made a
3 content-based argument.

4 THE COURT: My viewpoint is Black kids should
5 not play on high school football teams in New
6 Hampshire. That's my position; that's my viewpoint.
7 You can't prohibit me from attending a high school
8 football game with a sign, holding up, that says Blacks
9 are inferior and shouldn't be playing on high school
10 football teams in New Hampshire. Yes, they can. Can't
11 they?

12 MR. KOLDE: That wasn't this case.

13 THE COURT: Can the school board not say,
14 Yeah, you don't get to do that at our football games?

15 MR. KOLDE: That's not our case.

16 THE COURT: I know.

17 MR. KOLDE: They might be able to say that.

18 THE COURT: Of course, it's not your case.
19 You know how we reason; we reason from the ends.

20 Do we agree that's not appropriate, and that can
21 be controlled?

22 MR. KOLDE: Probably.

23 THE COURT: I hope we agree that can be
24 controlled.

25 MR. KOLDE: It would depend on all the facts

1 of the case.

2 THE COURT: And it's being controlled in the
3 interest of protecting students.

4 MR. KOLDE: So, Your Honor, I don't want to
5 get into the facts any further at this point. I see
6 the Court has made up its mind for today, but I think
7 it would be helpful to us to tentatively set the
8 preliminary injunction hearing, and maybe there to be
9 some amongst the parties of what the Court's
10 expectations are for the development of the factual
11 record. Are you wanting live testimony?

12 THE COURT: Well, now, you know, I am really
13 hesitant after all these decades to tell counsel how to
14 try their own case because that inevitably falls back
15 on me, He didn't tell me I shoulda whatever. So I
16 don't do that.

17 We're going to combine the permanent injunction
18 hearing with the preliminary injunction hearing, so it
19 will be a trial on the permanent injunction.

20 MR. KOLDE: Yeah.

21 THE COURT: It's your burden, I'm sure you
22 understand, Mr. Cullen, your burden to justify the
23 limitation you placed on the speech. I expect to hear
24 evidence on context, on intent, on effect, on purpose,
25 on what the limitations were and where they come from

1 and who decided, and whether or not it actually makes
2 sense in the real world. And I expect thorough legal
3 briefing on this notion of how far does the *Tinker*
4 obligations and duties of protecting students go in
5 terms of the limited public forum where adults are
6 expressing speech. How far does that go? How far can
7 you go in keeping adults from saying things that
8 students, say, couldn't say? How far? How far does
9 the *L.M. XX* on the t-shirt ruling -- how far does that
10 apply to an adult speaking?

11 MR. KOLDE: Not at all.

12 THE COURT: Well, I would like to see
13 something other than your personal opinion. I would
14 like to see some legal authorities. I would like to
15 see it thoroughly discussed and briefed. Any -- you
16 should get together. I don't think I need you to
17 reproduce all the experts about the harm related to
18 transgender students from "XX only" t-shirts unless you
19 insist, I guess, because the First Circuit has already
20 sort of discussed that and accepted it, I think. You
21 may want to -- are you going to put them to the proof
22 to show the vulnerability of the kid and what the risks
23 of harm --

24 MR. KOLDE: For wearing a pink wristband with
25 XX on it? Yeah. We don't concede that's harmful in

1 any way.

2 THE COURT: Again, that's why I don't like to
3 tell you how to try your own case. If you don't -- I
4 guess, I don't know what you're going to do. You can
5 present evidence to that effect, I guess. I think I
6 can take judicial notice of it, I'm not sure, based on
7 the First Circuit's opinion. Maybe I can.

8 MR. KOLDE: Your Honor, so there's another
9 issue which counsel alluded to. We asked for the
10 body-cam video. It was denied under an RTK exception.
11 But, you know, counsel indicated they would comply with
12 all, you know, discovery orders of the Court. Clearly,
13 counsel for the defense has seen the body-cam video;
14 it's referred to in the declarations. We would like
15 it. We think it's relevant, but without an order from
16 the Court, I don't think they're going to give it to us
17 under their interpretation of state law. I don't think
18 it's really beneficial to litigate this in state court,
19 and I'm not planning to. So we would like the Court to
20 direct --

21 THE COURT: It's plainly relevant. Don't you
22 think? It's relevant to you.

23 MR. CULLEN: Yeah. I don't have an objection
24 to it. I just don't want to violate the State statute,
25 so if the Court orders it to be produced as part of

1 discovery in this case --

2 THE COURT: So ordered. I think it's
3 particularly relevant to the length and extent of the
4 no trespass order.

5 MR. KOLDE: Your Honor, I don't want --
6 because my clients' rights are continuing to, you know
7 be impacted here. We would like to have an early as
8 possible NPI combined NPI hearing on the merits as we
9 can. I understand counsel's schedule. I also have a
10 lot going on. The Court, I'm sure has a lot going on.

11 THE COURT: No, actually, I'm pretty
12 flexible. Senior status.

13 MR. KOLDE: Can we pick a date and shoot for
14 that?

15 THE COURT: Absolutely.

16 MR. KOLDE: Can we do that and set that here?

17 THE COURT: I expect you're going to need at
18 least a couple days, right?

19 MR. CULLEN: A couple days? I'd think we'd
20 need more than that, Your Honor. You've listed a
21 fairly intense list of things.

22 MR. KOLDE: For the hearing length?

23 MR. CULLEN: Oh, I apologize. I thought you
24 meant a couple days before it's to happen.

25 THE COURT: No. No. A couple days of

1 hearing time.

2 MR. CULLEN: I apologize, Your Honor. Yes, I
3 misunderstood that. I assume there's four or five
4 witnesses there. We've got two or three --

5 MR. KOLDE: All my clients will want to
6 testify.

7 THE COURT: So, three, four? Eight, ten
8 total?

9 MR. CULLEN: Certainly, not more than ten,
10 unless we can reach an agreement on the expert issue, I
11 suppose.

12 THE COURT: Yeah. Look into judicial notice
13 of the fact. I don't know. The circuit seemed to,
14 yeah. I'm not sure what they do now, whether they
15 accepted the evidence or whether they just say it was
16 enough to --

17 MR. KOLDE: If they want to make us a
18 proffer, we'll take it under consideration, Your Honor.
19 It's real hard for me to evaluate on the fly.

20 THE COURT: Yeah. It basically is
21 transgender students are particularly vulnerable, and
22 harassment causes particularly serious long-time
23 injury. That's what it is.

24 MR. KOLDE: Can we pick a date?

25 MR. CULLEN: We can certainly try. Actually,

1 you know, the -- Superintendent Kelley is not allowed
2 to bring her phone in --

3 THE COURT: I'm sorry. What?

4 MR. CULLEN: The superintendent can't bring
5 her phone in, so she doesn't have her calendar.

6 THE COURT: She can bring her phone in.

7 MR. CULLEN: She couldn't do it today. So we
8 can't really necessarily pick an exact date. Perhaps
9 if the Court gives us a sense of it, we can work it out
10 with the clerk.

11 THE COURT: I'm flexible. I'm happy to do it
12 as soon as you can arrange to do it.

13 MR. KOLDE: Can we do that today?

14 THE COURT: Sure.

15 MR. CULLEN: I don't know if we can do it
16 today. It depends on --

17 THE COURT: You can do it today. Get
18 together with the deputy clerk.

19 MR. KOLDE: November day or are we doing
20 October, later in October?

21 MR. CULLEN: November day. Sometime in
22 November.

23 THE COURT: Fine.

24 MR. CULLEN: Thank you.

25 MR. KOLDE: And, Your Honor --

1 THE COURT: We'll make it work.

2 MR. KOLDE: Would the Court be willing to
3 just enter a limited order to allow Mr. Fellers to go
4 back to the games, even without wearing a wristband for
5 now, just so he can watch through the end of the
6 season?

7 THE COURT: If you're asking me for a
8 temporary restraining order with respect to his
9 attending games without protesting on this issue --

10 MR. KOLDE: Yes.

11 THE COURT: -- I don't have a problem with
12 that. Do you have a problem with entering that order?

13 MR. CULLEN: I do, Your Honor, because --

14 THE COURT: He's not going to wear a
15 wristband.

16 MR. CULLEN: I know, but it was his comment
17 after the fact that --

18 THE COURT: It may turn out to be illegal.

19 MR. CULLEN: It may. It may, Your Honor.

20 THE COURT: Take the win.

21 MR. CULLEN: How about this, Your Honor:
22 There's a senior game coming up on the 17th, or the
23 18th. Why don't we allow him to go there without the
24 games (sic) to celebrate his kid?

25 THE COURT: Listen, tell you what. I'm not

1 willing -- I think this is a push in terms of the
2 evidence. The factual development is a push. Legally,
3 I think it's nuanced, and it's a jump ball. That's the
4 way I look at it. So you haven't met your burden in
5 showing likelihood of success on the merits, in my
6 view. However, he could win, and it could turn out
7 that what you've done in terms of the trespass is not
8 sustainable. So in an effort to balance the equities
9 somewhat, I will enter a restraining order allowing
10 Mr. Fellers to attend his child's soccer games for the
11 rest of the season.

12 MR. KOLDE: Can he pick her up from practice
13 too, Your Honor?

14 THE COURT: Is there a problem with that?

15 MR. CULLEN: I think it's a matter of not
16 having him have interactions with the coach, Your
17 Honor.

18 THE COURT: He can pick up his child from
19 soccer practices, no interaction with the coaches, no
20 speaking, proselytizing, advocating, protesting, speech
21 making. None of that. And he can attend his
22 daughter's games for the rest of the season. No
23 protesting, no violation of any of the rules and
24 expectations of good sportsmanship promulgated by the
25 school, and then we'll see on the merits how this works

1 out. All right?

2 MR. KOLDE: Understood. Will the Court enter
3 an order, or do you need us to submit an order on that?

4 THE COURT: Counsel understand my order?

5 MR. CULLEN: I understand what you've asked.

6 THE COURT: This is New Hampshire. Thank
7 you. We're adjourned. Get together with the deputy
8 clerk and arrange a schedule.

9 MR. KOLDE: We'll do it.

10 (Hearing concluded.)

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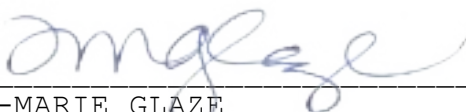
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CERTIFICATE

I, Jan-Marie Glaze, RPR, CRR, Pro-Tem Court Reporter for the United States District Court for the District of New Hampshire, do hereby certify that I was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I have caused said stenographic notes to be transcribed under my direction and that the foregoing pages are a true and accurate transcription to the best of my ability.



JAN-MARIE GLAZE
COURT REPORTER